UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

JOEL KUNIN, Trustee of the Estate of Spartan Printing Company,	)	
Plaintiff/Appellant,	)	
vs.	)	No: 98-CV-0532-PER
J. WRIGHT BUILDING CENTER, INC.,	)	BK No. 95-41031
Defendant/Appellee.	)	Adv. No. 97-3328

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction and Procedural History

On October 31, 1995 (the "petition date"), Spartan Printing Co. ("Spartan") of Sparta, Illinois filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, **11 U.S.C. § 101, *et seq*.** Unable to effectuate a plan of reorganization, Spartan converted to a Chapter 7 liquidation, **11 U.S.C. § 701, *et seq*.** On March 19, 1996, Joel Kunin ("the Trustee") was appointed to the Spartan bankruptcy estate.

On October 27, 1997, the Trustee filed an adversarial complaint to avoid preferential transfers against J.W. Wright Building Center, Inc. ("Wright"). The Trustee sought to avoid and recover alleged preferential transfers under Section 547 and 550 of the Bankruptcy Code, **11 U.S.C. §§ 547, 550**.

Prior to the petition date, Spartan did business with Wright, a building materials Supply shop also located in Sparta, Illinois, for more than fifteen years. Wright sold lumber, hardware and specialty products to Spartan until the petition date. Specifically at issue here are ten payments totaling $70,166.12 made by

Spartan to Wright during the 90-day period immediately preceding the petition date, August 2, 1995, through October 31, 1995 ("the preference period").

The parties do not dispute that the ten checks amount to preferential transfers. **11 U.S.C. §§ 547 and 550.** Neither party disputes that $34,677.10 of that sum is "new value" extended by Wright to Spartan and excluded from recovery by the Trustee. **11 U.S.C. § 547(c)(1).** The schism arises with regard to the remaining $35,489.02 of the $70,166.12. Wright argues that this $35,489.02 qualifies for the "ordinary course of business" exception, which allows Wright to keep it. **11 U.S.C. § 547(c)(2)**. The Trustee contends that the "ordinary course of business" exception does not apply, so he may avoid and recover the $35,489.02.[1]

On May 18, 1998, Bankruptcy Judge Gerald D. Fines presided over a trial on the matter. On June 15, 1998, the Bankruptcy Court found for Wright. The Trustee appeals that ruling. The only issue on appeal is whether $35,489.02 out of $70,166.12 paid by Spartan to Wright after August 2, 1995, qualifies for the "ordinary course of business" defense under **11 U.S.C. § 547(c)(2).** The Court has jurisdiction over this appeal from the Bankruptcy Court pursuant to **28 U.S.C. § 158(a).**

II. <u>Facts</u>

Before the petition date, Spartan was an "institution" and the largest employer in Sparta (Trial Transcript, p. 4 1). Although they conducted business for over 15 years, Wright started "develop[ing]" Spartan into a larger account in early 1993 (*Id.*, p. 14). Typically during their relationship, Spartan would order goods from Wright via telephone or written purchase order (*Id.*, p. 15). After some haggling over

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[1]In his complaint, the Trustee originally sought $37,210.78. At trial, he stipulated to $35,489.02 (Trial Transcript, p. 11).

price, Wright would fill the order, deliver the goods, and issue an invoice for the order (*Id*., pp. 15, 28). The invoice required payment from Spartan by the tenth day of the following month (*Id*., pp. 30, 45). During their relationship, like most other customers, Spartan regularly failed to comply with the payment deadline (*Id*., pp. 45-46, 51). Wright acceded to Spartan's derelict payments, a commonly accepted practice within the industry, and accrued finance charges for late payments (*Id*., pp. 45-46, 51). Wright tolerated greater delinquency from Spartan than from other customers, because Spartan was Wright's biggest "dollar volume" customer (*Id*., p. 50).

Spartan did not pay Wright "by invoice" (*Id*., p. 31). The checks written by Spartan to Wright do not match payments with specific invoices (Bankr. Record, Doc. 10, Exh. A) Mark Meyerhoff, the assistant manager in charge of the Spartan account, testified "how old an invoice was didn't really matter" (Trial Transcript, p. 31). Rather, Meyerhoff would make calls to Spartan to inquire about payments if the total "amount outstanding" ballooned (*Id*., pp. 31, 33). In short, Meyerhoff only cared about the "bottom line" (*Id*., p. 33).

On the last day of each month, Wright issued a monthly account statement to Spartan designating: (1) the previous month's balance; (2) the payments received by Wright from Spartan during the month; (3) Spartan's new credit purchases for the month (*i.e.*, a compilation of new invoices); and (4) the "new balance" on Spartan's account (Bankr. Record, Dft's Exh. 1 ("Dft's Exh. 1 ")). The "new balance" on Spartan's account was further parsed into five categories of unpaid invoices: (a) "current charges," representing all unpaid invoices issued during the previous two months; (b) "1 -30 Days" charges, representing 60 to 90 day invoices; (c) "31-60 Days," representing 90 to 120 day invoices; (d) "61-90 Days," representing 120 to 150 day invoices; and (e) "Over 90" (Dft's Exh. 1; Trial Transcript, pp. 46-47).

This method of aging Wright's accounts receivable served as an accounting device that allowed Wright to accrue finance charges and spot customers that "needed collection activity" (Trial Transcript, p. 48). Wright submitted a summary of monthly statements issued from November 30, 1993 until the petition date (Dft's Exh. 1).

The summary of monthly statements indicates that Spartan haphazardly paid down its balance with Wright. For example, one month Spartan paid $8,196.59, the next month Spartan paid $23,443.26, and some months Spartan made no payments (Dft's Exh. 1). Although Spartan did not pay by invoice, Wright used a FIFO (First In, First Out) method of accounting to match individual invoices with lump-sum payments.[2] For example, on November 21, 1994, Spartan might have issued a check for $3,000. Wright would identify the oldest unpaid invoice, subtract that amount outstanding from the $3,000 payment, designate the next oldest unpaid invoice, subtract that amount from the amount remaining after subtracting the oldest unpaid invoice, and so on, until exhausting the $3,000 check (Doc. 10, Appendix, Pltf's Exh. 4 ("Pltf's Exh. 4")).

Dennis McIntyre, general manager of Wright's Sparta store, testified that he regularly monitored the aging of Wright's account to spot "old" accounts receivable (Trial Transcript, p. 42). If an account aged to the "31-60" or "61 to 90" stage, McIntyre would start calling in the chips (*Id.*). McIntyre testified that due to Spartan's dependability and volume of orders, "we saw them out in the 31 to 60 on a fairly regular

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[2]As applied to inventory situations, the "FIFO inventory method ... assumes that the oldest goods are sold out of inventory first." ***Walter v. U.S.*, 148 F.3d 1027, 1030 n.1 (8th Cir. 1998).** Similarly, in this case, when Wright received payments, they were applied "on the back end" -- *i.e.*, FIFO (Trial Transcript at p. 31). The invoice list submitted at trial also indicates a FIFO method of accounting for invoice payments (Pltf's Exh. 4).

basis, we weren't terribly concerned at that point" (*Id.*, p. 49).

Each side presented expert witnesses at trial to support their angle on Spartan's business practices. Donald Minton, testifying on behalf of Wright and recognized by the Bankruptcy Court as an expert in the building materials industry, testified that Wright's billing and payment practices with Spartan were typical within the industry *(1d.*, pp. 67-68). Before he retired in 1997, after a 44-year career, Minton worked as a general manager of seven stores for Associated Lumber Industries, a business similar to Wright (*Id.*, p. 64). He also served on the board of directors of the Illinois Lumber Material Leaders Association (*Id.*, p. 65). Minton attested to his familiarity with Wright's billing and accounts receivable aging process (*Id.*, p. 66). He stated that Associated Lumber used an identical method (*Id.*). He also testified that the lateness of Spartan's payments and the aging process of Wright's accounts receivable typified the industry custom (*Id.*, p. 67).

John A. Beighel, the Trustee's expert, presented testimony indicating that Spartan favored Wright over other creditors by paying several old invoices during the preference period. He stated that $34,677.10 out of the $70,166.12 represented new credit sales made to Spartan after August 2, 1995 *(1d.*, p. 81). He testified that $35,489.02 corresponded with invoices issued prior to August 2, 1995 (*Id.*, p. 81).

To isolate the specific invoices paid by the $70,166.12, Beighel compiled a list of invoices issued by Wright to Spartan between January 1, 1994 and October 31, 1995 (Pltf's Exh. 4). Using FIFO, he then matched individual invoices with payments from Spartan (*Id.*). Beighel was most interested in invoices outstanding from *before* the preference period (*i.e.*, before August 2) that corresponded with payments made *after* August 2. The relevant preference payments spanned all invoices outstanding from April 13), 1995 through August 1, 1995 - totaling $35,499.02 (Pltf's Exh. 4, pp. 29-34). The Trustee argues that this $35,489.02 is a voidable preference, while Wright argues that it falls under the "ordinary course of business" exception.

To rebut the "ordinary course of business" defense, Beighel calculated the average number of days that the April 13 through August 1 invoices were outstanding (their "lag-times") - 90 days - and compared that number with the average days unpaid for all invoices paid between January 1, 1994 and October 31, 1995 - 56 days (Trial Transcript, pp. 80-83). The Trustee contends that the large disparity in lag-times between the post-August 2 preference payments, that corresponded with the April 13 through August 1 invoices, and Spartan's overall pattern, 90 days versus 56 days, demonstrates that Spartan paid the April 13 through August 1 invoices *out of* the ordinary course of business. While Beighel also compared the lag-times by "median" days outstanding, his analysis did not cite a statistical variance that would be an acceptable departure from the norm (*i.e.*, days outstanding that were still within the ordinary course of business).

In supporting its "ordinary course of business" defense, Wright focuses on the conduct of its own employees and points the Court to the testimony of McIntyre and Meyerhoff. Both McIntyre and Meyerhoff testified that they did not know about Spartan's eminent bankruptcy, and the dynamics of the Spartan/Wright relationship did not change prior to the petition date (*Id.*, pp. 16, 52-54). McIntyre testified that Wright neither sent threatening letters nor increased collection activities on Spartan's account during the preference period (*Id.*, pp. 51-53).

III. <u>Analysis</u>

A. <u>Avoidable Preferences and Exceptions under Sections 547(b) and c</u>

Through **11 U.S.C. § 547(b)**, Congress authorized bankruptcy trustees to "avoid any transfer[s] of an interest of the debtor in property" if the transfers: (1) benefit a creditor; (2) are on account of an antecedent debt; (3) are made while the debtor was insolvent; (4) are made within 90 days before bankruptcy; and (5) enable the creditor to receive a larger share of the estate than if the transfer had not been made. ***Union Bank v. Wolas,* 502 U.S. 151, 154-55 (1991).** *See generally* ***In re Tolona Pizza Products Corp.,* 3 F.3d 1029, 1031 (7th Cir. 1993) ("The purpose of the preference statute is to prevent the debtor during his slide toward bankruptcy from trying to stave off the evil day by giving preferential treatment to his most importunate creditors, who may sometimes be those who have been waiting the longest to be paid").** Under **11 U.S.C. § 547(f)**, the debtor is presumed insolvent during the 90-day period preceding bankruptcy. Neither side in this case disputes that the ten payments after August 2, 1995, (totaling $70,166.12) are preferences.

Subsection (c), however, provides for seven exceptions to the preference rule. **11 U.S.C. § 547(c)**. The parties agree that under Section (c)(1), dubbed the "new value" exception, the Trustee cannot reach the $34,677.10 that Spartan paid to Wright after August 2.[3] **11 U.S.C. § 547(c)(1).** The main issue in this appeal relates to the remaining $35,489.02. Wright argues that that amount constitutes an "ordinary course of business" transfer under **11 U.S.C. § 547(c)(2):**

The trustee may not avoid under this section a transfer ...

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[3]**11 U.S.C. § 547(c)(1)** states that:
The trustee may not avoid under this section a transfer
...
1) to the extent that such transfer was
(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
(B) in fact a substantially contemporaneous exchange.

(2) to the extent that such transfer was -

> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms.

The purpose of the ordinary course of business exception "is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section, to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." **H.R. Rep. No. 95-595, at 373, U.S. Code Cong. & Admin. News 1978, p. 6329.** ***See In re Midway Airlines,*** **69 F.3d 792,797 (7th Cir. 1995) ("the exception carved out by section 547(c)(2) ... is designed to protect recurring customary credit transactions that are received and paid in the ordinary course of the business of the debtor and the debtor's transferee" (internal quotations omitted)).** To retain the $35,489.02, Wright "must prove, by a preponderance of the evidence, that the transaction was ordinary as between the parties." ***Midway Airlines,*** **69 F.3d at 797; 11 U.S.C. § 547(g).**

For Sections 547(c)(2)(A) and (B), "a court's focus is on the specific relationship between the parties and the particular course of dealing between the parties." **Barber v. Golden Seed Co., 129 F.3d 382, 390 (7th Cir. 1997).**

> Among factors courts consider in determining whether transfers are ordinary in relation to past practices are: (1) the length of time the parties were engaged in the transaction at issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and (4) whether the creditor took advantage of the debtor's deteriorating financial condition.

In re Midway Airlines, Inc., **180 B.R. 1009, 1013 (Bankr. N.D. Ill. 1995);** ***Barber,*** **129 F.3d at 390**.

hen considering Section 547(c)(2)(C), "a court must focus on industry standards and common practice." ***Barber*****, 129 F.3d at 390.** "To satisfy 547(c)(2)(C), the transferee need only establish that its own dealings with the debtor fall 'within the outer limits of normal industry practice.'" ***Id.* (quoting Tolona *Pizza,* 3 F.3d at 1033).**

Applying the aforementioned guidelines for Section 547(c)(2), courts have held that payments on long-term debt, as well as payments on short-term debt, "may qualify for the ordinary Course of business exception." **Wolas, 502 U.S. at 162.** Additionally, late payments can be in the ordinary course if common in the dealings between the parties. **In re Xonics Imaging Inc., 837 F.2d 763, 766-67 (7th Cir. 1988).** In sum, "[t]o determine whether a payment was according to ordinary business terms, most courts took both to the practice between this creditor and this debtor, and to the practices in the industry." **JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, PRACTITIONER TREATISE SERIES § 32-5, at 273 (4th ed. 1995).**

B. Standard of Review

Whether a debtor makes payments in the ordinary course of business and according to ordinary business terms "is a factual determination [by the bankruptcy court] which should not be set aside [by the district court] unless clearly erroneous." ***Yurika Food Corp. v. United Parcel Service,* 888 F.2d 42, 45 (6th Cir. 1989); FED. R. BANKR. P. 8013.** ***See Tolona Pizza,* 3 F.3d at 1033 ("The district judge, and we, are required to accept the bankruptcy judge's findings on questions of fact as long as they are not clearly erroneous").** A finding of fact "is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." ***Luper v. Columbia Gas of Ohio, Inc.,* 91 F.3d 811, 813 (0 Cir. 1996) (quoting**

***Logan v. Basic Distribution Corp.*, 957 F.2d 239, 242 (6th Cir. 1992)). Cf. *Barber,* 129 F.3d at 386 ("[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, a court of appeals may not reverse it (internal quotations omitted)).** The Court must, therefore, engage "in a factual analysis of the business practices which were unique to the particular parties under consideration." **Yurika, 888 F.2d at 45 (internal quotations omitted)**.

The district courts exercise *de novo* review over the bankruptcy courts' findings of law" **In re Midway Airlines, 69 F.3d at 795.**

C. Application of Sections 547(c)(2)(A) and (B) to the Wright-Spartan Relationship Prior to trial in the Bankruptcy Court, the parties stipulated that Wright satisfied Section 547(c)(2)(A) (Bankr. Opinion, p. 8). Neither party raises that issue on appeal. Rather, the Trustee rests his appeal on the contention that the Bankruptcy Court erred in discounting Beighel's statistical "lag-time" evidence, which the Trustee argues proves that Spartan did not pay the $35,489.02 "in the ordinary course of business or financial affairs of the debtor and the transferee," under **11 U.S.C. § 547(c)(2)(B).**

The Bankruptcy Court found that Wright fulfilled Section 547(c)(2)(B) by showing that: the parties had a considerable history; the amount and form of payment by Spartan did not differ from past practices; in the months preceding the petition date, Wright conducted business as usual with Spartan; Wright had no knowledge of Spartan's impending bankruptcy and engaged in no unusual collection activities; and Wright never pressured Spartan for payments, never sent threatening letters, and never raised the specter of litigation. In short, the Bankruptcy Court only discussed one-half of the equation - focusing on Wright's conduct prior to the petition date, accepting the testimony of Wright's witnesses *carte blanche,* and never considering Spartan's payment activities as reflected by the circumstantial evidence presented by Beighel.

The Court agrees that the Bankruptcy Court erred in discounting Beighel's testimony. The Court does not find, however, that the Bankruptcy Court Judge clearly erred in holding that Wright satisfied Section 547(c)(2)(B).

The testimony of Meyerhoff and McIntyre provided a sufficient basis for finding that Wright fulfilled three factors outlined in *Midway Airlines* and *Barber:* Wright and Spartan maintained a solid relationship for many years; Wright did not engage in any unusual collection activity; and Wright did not leverage Spartan's deteriorating financial condition. ***Barber*, 129 F.3d at 390; Schwinn Plan *Comm. v. AFS Cycle & Co., Ltd.*, 205 B.R. 557,572-73 (Bankr. N.D. Ill. 1997); *Midway Airlines, 180* B.R. at 1013.** The Bankruptcy Court erred by failing to analyze whether Beighel's testimony showed that Spartan engaged in unusual and preferential payment activities by submitting $35,489.02 for invoices outstanding from before August 2.

Wright did not produce any Spartan employees attesting to Spartan's financial or business affairs, or to its activities during the preference period. The only evidence before the Bankruptcy Court pertaining to Spartan's intent and practices was a summary of Wright's monthly statements issued to Spartan and Beighel's analysis of Wright's invoices.

(1) Summary of monthly statements

As noted above, Spartan did not pay Wright by invoice. Spartan would run up a balance and randomly pay it down. The monthly statement from July 31, 1995, listed Spartan's balance outstanding at $41,038.70 (Dft's Exh. 1). By August 31, 1995, Spartan had reduced its balance to $28,418.54 (1d.). By the petition date, Spartan further cut the debt to $6,747.05 (*Id.*). During the three month period starting on July 3 1, 1995, which coincided with the preference period, Spartan's payments substantially outpaced its new purchases, and Spartan reduced its balance by over 80% (1d.). Moreover, compared with payments during the month of June ($0.00) and taking into account Spartan's new credit purchases (over $45,000), Spartan's payment trend during tile preference period would, at first glance, seem to indicate highly unusual payouts to Wright (*Id.*).

Close analysis of the entire history of monthly statements, however, reveals that Spartan did not deviate from its past practices during the preference period. As a result of paying nothing to Wright during January and February of 1995, Spartan carried a balance of $58,913.59 on February 28, 1995 (*Id.*). By paying $23,338.06 and $35,868.26 in March and April 1995, greatly exceeding new credit purchases, Spartan reduced its balance to $27,079.85 by April 30, 1995 (*Id.*). In March 1994 and October 1994, Spartan wrote larger than normal checks to diminish its principal (*Id.*).

Viewed from the perspective of Spartan's monthly balances, Spartan's payments during the preference period did not differ significantly from its prior practices. Over the course of the business relationship with Wright, Spartan regularly paid-down exorbitant balances. The Court's discussion, however, does not end there. The Trustee bases his rebuttal of Wright's ordinary course of business defense on the old age of many of the invoices paid during the preference period. Beighel's testimony quantifies the Trustee's argument.

(2) Beighel's Testimony

Beighel testified that the average lag-time was 90 days for pre-August 2 invoices satisfied by preference payments, longer than the usual 56 days (Beighel calculated the medians, respectively, at 83 and 48 days). Thus, the Trustee argues, during the preference period the $35,489.02 corresponding with pre-August 2 invoices were paid *out of* the ordinary course of business between Spartan and Wright.

The debtor made a similar argument in ***Official Plan Comm. v. Expeditors* Int'l of Wash., Inc., 214 B.R. 870, 875 (8th Cir. BAP 1997)**.[4] In that case, like this one, a creditor issued invoices requiring payment within 15 days of the invoice date. ***Id.* at 872**. Also like this case, the debtor almost never paid the invoices on time and regularly accumulated large balances. ***Id.*** Unlike the facts here, the debtor paid by individual invoice, and the creditor would deliver new goods to the debtor upon payment of a prior invoice. ***Id.*** Using the nine months preceding the preference period to establish an ordinary course of business, the debtor demonstrated a 35-day median lag-time, while the number increased to 54 days during the preference period. ***Id.* at 875**. The court affirmed the bankruptcy court's finding that the preference payments were made out of the ordinary course of business. ***Id.* at 876**.

Global Distribution Network, Inc. v. Star Expansion Co., et al., 103* B.R. 949, 954-56 (Bankr. N.D. Ill. 1989),** illustrates another case analyzing average pre- and post-preference period lag-times. That court dealt with several creditors, each receiving one check during the preference period. *Id.* at 950. The court designated the invoices corresponding with each check, but did not state whether the debtor identified the invoices as part of the transfer, or whether the creditors' accounting systems matched invoices. ***Id. The court found that average preferential period lag-times exceeding the usual lag-times by 42,49, and 53 days did not qualify for the Section 547(c)(2) exemption. ***Id.* at 954-56**.

In ***Steegge v. Nolan & Co. Graphics and Advertising, Inc., et al.,* 183 B.R. 826, 830 (Bankr. N.D. Ill. 1995),** the court considered two checks paid to the creditor within the preference

[4]The debtor, rather than a trustee, tried to recover the preference payments because ***Expeditors Int'l*** involved a Chapter 11 reorganization with a debtor-in-possession. **11 U.S.C. § 1101, et seq.**

period. Unlike Spartan, on each check the debtor identified the individual invoices covered. ***Id.*** **at 830 n.2**. Demonstrating the flexibility of an average lag-time analysis, the creditor -- not the Trustee -- used to argue that the average days outstanding for invoices paid during the preference period matched the average over the course of the business relationship. ***Id.*** **at 835**. The court rejected the creditor's argument finding "[i]t is pure happenstance" that the preference period average correlated with the parties' historical average. ***Id.*** **at 836**. Instead, the court analyzed the lag-time for each individual invoice, compared with the industry averages and the average during the business relationship, and held that the ordinary course of business defense did not apply. ***Id.***

Excepting ***Global Distribution Network***, where the court did not indicate whether the debtor paid by invoice, the courts in ***Steege*** and ***Expeditors Int'l*** noted that the debtor identified which payments covered which invoices. The courts established an ordinary business practice for the parties and then judged whether the preference period transfers conformed to that past conduct.

In this case, having found no indication that Wright initiated abnormal collection efforts, the main issue is whether the payment of $3 5,489.02 conformed with the ordinary course of business or financial affairs of the debtor. **11 U.S.C. § 547(c)(2)(B).** To answer that question, this Court considers "whether the amount or form of tender differed from past practices [and] whether the debtor ... engaged in any unusual ... payment activity." ***Midway Airlines, 180*** **B.R. at 1013.** When Spartan submitted checks to Wright, the payments did not cover individual invoices. Rather, Spartan's ordinary course of business solely reflected a concern for the size of its outstanding balance. The preference period payments did not demonstrate a significant deviation from that practice.

The Trustee attempts to demonstrate a departure from the ordinary course by concocting a misplaced lag-time analysis for the Spartan/Wright dealings. First, unlike the facts in ***Steege*** and ***Expeditors Int'l***, Beighel's testimony does not reflect Spartan's ordinary method of conducting the financial and business affairs with Wright. Second, accepting McIntyre's testimony about the accounts receivable aging process as probative of *Wright's* practices (*i.e.*, if the account aged past 31-60 days, Wright would make inquiries), his statements do not reflect *Spartan's* business and financial practices.[5]

Third, the Court does not view Beighel's methodology as facilitating a fair and just division of Spartan's preference transfers. Although Spartan and Wright did not conduct business in such a fashion, Beighel used accounting wizardry to pair invoices with spliced payments from Spartan. He then grouped the newly individualized invoices, calculated average lag-times, and cordoned off a swath of non-new-value preference payments - amounting to $35,489.02 - for the Trustee. The section of relevant invoices begins on April 13, 1995, and ends on August 1, 1995 (Pltf’s Exh. 4, pp. 29-34). The Court observes, however, that although the average lag-time for the April 13 to August 1 invoices is 90 days, Beighel lists invoices between June 26 and August 1 as having lag-times of between 80 and 45 days, with many invoices paid at or near the 56-day average for 1994 and 1995 (*Id.*, pp. 33-34). Even though, under Beighel's analysis, Spartan paid many invoices within the relevant time frame in conformity with the ordinary business practices of the parties, Beighel lumps together all invoices from April 13 to August 1 (to maximize the Trustee's take). Moreover, Beighel did not state an acceptable statistical variance from the average, and this Court cannot designate one, within which an invoice must fall (*i.e.*, would a lag-time of 70 days, a 14-day

[5]As a side note, the Bankruptcy Court could only infer Spartan's ordinary course of dealing from circumstantial evidence, because neither party presented direct evidence or testimony from anybody associated with Spartan.

variance from the norm, qualify for the ordinary course of business exception?).

Finally, the months of April, May and June 1995 are not the only periods where Beighel records excessive lag-times. Spartan waited between 90 and 111 days to pay invoices in January 1995 (*Id.,* pp. 24-25). In December 1994, Spartan paid a series of more-delinquent-than-usual invoices (*Id.,* pp. 22-23)). Prior long delays between the issuance of invoices and their subsequent payments indicates that the lag-times for April, May and June of 1995 differed only in that prior lapses lasted a month. The distinction is one of degree that, viewed in light of Wright's monthly statements, does not amount to a departure from the norm.

Given all the aforementioned considerations, and viewing the record as a whole – as indicative of the "business practices ... unique to the particular parties under consideration," ***Yurika,* 888 F.2d at 45** --, the Court is not "left with the definite and firm conviction that a mistake has been committed." ***Luper,* 91 F.3d at 813.** Although this Court believes that the Bankruptcy Court issued an incomplete analysis, the reversal of the final holding is not merited. With or without Beighel's testimony, the Court must uphold the Bankruptcy Court's findings with regard to Section 547(c)(2)(B).

D. <u>Application of Section 547(c)(2)(C) to the Wright-Spartan Relationship</u>

The Trustee argues that assuming Wright satisfied the first two prongs, Wright still failed to prove that third element of the ordinary course of business defense: that the debtor made the transfer "according to ordinary business terms." **11 U.S.C. § 547(c)(2)(C).** The Trustee argues that Minton's testimony, the only evidence- presented of common billing procedures in the building materials industry, failed to satisfy Section 547(c)(2)(C).

In ***Tolona Pizza, 3 F.3d at 1033,*** Chief Judge Posner, writing for the majority, refused to read

Section 547(c)(2)(C) as mere surplusage and found that,

> [ordinary terms] refers to the range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

In that case, one witness, the vice-president of the creditor, testified as to payment practices in the relevant industry. ***Id.*** **at 1033.** Like Minton's testimony in this case, the vice-president testified that the members of the industry "pay little or no attention to the terms stated on their invoices ... and allow certain favored customers to take even more time." ***Id.*** The testimony at issue in ***Tolona Pizza*** was more self-serving than Minton's testimony in this case, and Judge Posner allowed a wide berth for practices "at the outer limits of normal industry practices." ***Id.***

The Seventh Circuit in ***Tolona Pizza*** erected a low barrier for satisfying Section 547(c)(2)(C). Section 547(c)(2)(C) "does not require the introduction of evidence procured directly from competitors." ***Midway Airlines,*** **69 F.3d at 797.** At the same time, a creditor's evidence of "ordinary business terms" cannot be vague and must have been gleaned from "personal first-hand knowledge gained from exposure to the competitors' collections practices during, or near the preference period." ***Schwinn Plan Comn,*** **205 B.R. at 573 (citing *Midway Airlines,* 69 F.3d at 799, n.9)**. In sum, "section 547(c)(2)(C) requires objective proof that the disputed payments were, 'ordinary' in relation to the prevailing standard in the creditor's industry." ***Midway Airlines,*** **69 F.3d at 799**.

Citing to ***Midway Airlines*** and ***Tolona Pizza***, the Trustee argues that Minton did not testify as to the precise range of acceptable payment terms in the building materials industry, and that Minton only had experience with one of Wright's competitors (Associated Lumber). The Court disagrees with the

Trustee's characterization of Minton's testimony and the prerequisites for satisfying Section 547(c)(2)(C).

Minton testified that he worked in the industry for 44 years, including a stint on the board of directors of the Illinois Lumber Material Leaders Association (*Id.*, p. 64-65). From his experience and from his participation with a trade association, the Bankruptcy Court could reasonably infer Minton's familiarity with the billing practices of many competitors in the industry. He analyzed Wright's methods and found them to conform to an industry standard. Wright presented objective and reliable evidence of industry custom. The Seventh Circuit's decisions in ***Tolona Pizza*** and ***Midway Airlines*** never state or imply that Wright had to parade a group of experts into court. Notably, at trial, the Trustee never impugned Minton's credibility and never suggested that Wright's practices, in fact, do not conform to industry standards.

IV. Conclusion

The Court **AFFIRMS** the Bankruptcy Court's decision.

IT IS SO ORDERED.

DATED this 29th day of April, 1999.

/s/ PAUL E. RILEY
United States District Judge